

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/22/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 2001-000342

FILED: _____

STATE OF ARIZONA

LISA B BARNES

v.

KELLY ROBIN MCRAE

CHARLES P FRANKLIN

PHX MUNICIPAL CT
REMAND DESK CR-CCC

RULING
AFFIRM/REMAND

PHOENIX CITY COURT

Cit. No. 5960649

Charge: 1. DUI-ALCOHOL
2. DUI W/AC .10 OR MORE

DOB: 03-11-1968

DOC: 11-03-2000

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter was originally scheduled for oral argument September 10, 2001. Oral argument was vacated at the request of the parties. This matter has been under advisement since that

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date and this Court has considered the record of the proceedings from the Phoenix City Court, the exhibits made of record and the memoranda submitted by counsel.

Appellant was arrested November 3, 2000, and charged with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(1); Having an Alcohol Concentration of .10 or Higher within 2 Hours of Driving, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(2); and Failure to Drive Within One Lane, a civil traffic violation, in violation of A.R.S. Section 28-729.1. The matter was scheduled for a jury trial and Appellant filed a Motion in Limine requesting that the Court suppress the results of the breath test, claiming that a second sample was not provided or made available to Appellant as required by Baca v. Smith.¹ Appellant claimed that she had a serious and debilitating lung condition which prevented her from blowing for a long period of time and in a strong manner. Appellant blew into the Intoxilyzer machine five times: one completed sample showing a .112 blood alcohol content and three deficient samples showing .114, .114, and .108. Appellant also registered two .000 deficient samples. Because of Appellant's inability to blow into the Intoxilyzer machine, the Phoenix Police Officer modified the form entitled "City of Phoenix Preservation of Breath Sample Form" by crossing out the offer for a second breath sample and wrote in the word "blood." At the conclusion of the hearing on Appellant's Motion in Limine, Judge Alice Wright, Phoenix City Court Judge, denied Appellant's Motion to Suppress the breath test results. The trial judge found that there was no due process violation and that there was a good reason for the Phoenix Police Officers to offer Appellant an alternative second sample of "blood test" as opposed to a breath sample: that Appellant could not blow sufficiently into the Intoxilyzer machine.

¹ 124 Ariz. 353, 604 P.2d 617 (1979).
Docket Code 512

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Appellant's contention that she was denied her right to a second breath test pursuant to Baca v. Smith,² is without merit. Appellant was offered a blood sample, as an alternative to a breath sample because she could not continue to blow into the Intoxilyzer 5000 machine after the first breath sample which was sufficient. Appellant gave five deficient samples after her first blow. The blood sample was an appropriate alternative under these circumstances and the trial judge correctly found no due process violation.³

IT IS THEREFORE ORDERED affirming the trial court's denial of Appellant's Motion in Limine/Motion to Suppress, the breath test results, the judgments of guilt and the sentences imposed.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all future proceedings.

² Supra.

³ See State ex rel. Dean v. City Court of City of Tucson, 163 Ariz. 510, 789 P.2d 180 (1990).